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Nos. 88-429, 88-494

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT PUBLIC CITIZEN

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REPLY BRIEF FOR APPELLANT PUBLIC CITIZEN

INTRODUCTION

The briefs filed by the Justice Department and the ABA create the impression that the Federal Advisory Committee Act is a new, untested statutory scheme, enacted by Congress for the express purpose of stifling the President's use of advisory bodies. To read the briefs of appellees in isolation would inevitably lead to the conclusion that FACA creates such onerous restrictions on the use of advisory committees that the President and federal agencies generally forgo their use entirely.

Appellees' portrayal of the advisory committee process, however, bears no resemblance to reality. FACA was enacted in 1972, not for the purpose of eliminating the many advisory committees that serve a valuable function but, rather, to create minimum standards of public accountability and openness that are consistent with the vital function that such committees play in government decisionmaking. As explained in the President's most recent annual report on federal advisory committees, Congress, in enacting FACA:

> formally recognized the merits of seeking out non-federal sources of information and advice. At the same time, however, the Congress also sought to ensure that the advice provided by committees be relevant, objective, and accessible to the public. The formalized process created by the FACA for use by the Executive Branch . . . seeks to achieve these objectives, as well as to provide a basis for continuing oversight of committee activities.

President's Seventeenth Annual Report on Federal Advisory Committees, at 1 (Fiscal Year 1988) (hereafter "President's Seventeenth FACA Report").

Consistent with this Congressional intent, the President and

federal agencies have effectively incorporated FACA's procedural safeguards into their use of a large number of advisory committees. As detailed in the President's Seventeenth FACA Report:

> During fiscal year 1988, 58 Federal departments and agencies sponsored 1,020 advisory committees, a 17.3 percent increase compared with the number of groups in existence during fiscal year 1987. A total of 21,236 individuals served as committee members; 3,516 meetings were held; and 996 reports were issued.

Id. at 2. Moreover, during 1988, the executive branch used 205 peer review advisory committees which, as explained by Public Citizen in its opening brief and never refuted by appellees, are directly analogous to the ABA Committee. *See* PC Br. at 37. Finally, the President reported that, while the majority of the 3,516 meetings held by advisory committees in 1988 were open or partially open, nearly a thousand meetings were totally closed under the Act's exemptions, including meetings held by peer review committees to discuss the qualifications and credential of individuals seeking government grants or other benefits. President's Seventeenth FACA Report at 2.

Appellees simply have no answer to the question of why thousands of advisory committees have found it feasible to both comply with FACA and fulfill their advisory functions, yet application of the Act to the Justice Department's use of the ABA Committee is so fraught with difficulties that it rises to the level of a constitutional invasion. This omission is fatal, as we more fully explain below, to both appellees' statutory and constitutional arguments. Before turning to those matters, however, we first respond to the challenges that have been made to appellants' standing.

I. APPELLANTS HAVE STANDING TO CHALLENGE THE JUSTICE DEPARTMENT'S REFUSAL TO COMPLY WITH FACA'S CHARTERING AND OPEN GOVERNMENT REQUIREMENTS.

The Justice Department concedes that appellants have standing to press their claims under the open meeting and document access provisions of FACA, but it suggests that appellants cannot complain about the Department's failure to comply with any of the Act's other requirements. DOJ Br. at 11-16. The ABA, in contrast, advances the extreme position that neither appellant nor any member of the public has standing to assert any claim under FACA regarding the Department's use of the Committee. ABA Br. at 12-17. We have several responses to these contentions, which are being raised for the first time in this Court.[1]

To begin with, the ABA's argument is contrary to seventeen years of precedent in the lower federal courts. Since the enactment of FACA in 1972, the courts have, without exception, ruled that those denied access to meetings and records of advisory committees suffer a deprivation of statutorily-created rights in precisely the same manner as persons seeking access to records of federal agencies under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and meetings of federal commissions under the Sunshine Act, 5 U.S.C. § 552b.[2]

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[1] To the extent that appellees' standing defense focuses on purported deficiencies in appellants' complaints, see ABA Br. at 13-14, DOJ Br. at 12-14, their invocation of the defense for the first time in this Court is particularly inappropriate. Obviously, if either appellee had raised such claims below, appellants could have amended their complaints accordingly. Thus, unless the Court concludes that Article III erects an insurmountable barrier to appellants' standing, the defense should be deemed to have been waived.

[2] *See, e.g., National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (members of the public have standing to "enforce rights [to open meetings and records]

Contrary to the ABA's argument, this Court has never inquired into whether the interests of requesters under the FOIA or the Sunshine Act "would [in fact] be better served if they had access to the deliberations and documents" being sought. ABA Br. at 15. Thus, in its only ruling under the Sunshine Act, the Court resolved the merits of a claim without analyzing whether the plaintiff would in fact benefit from the information discussed at the meeting. *See FCC v. ITT World Communications*, 466 U.S. 463 (1984). And in resolving more than twenty cases under the FOIA over the past fifteen years, this Court has never suggested that those seeking to enforce the law need show any more than that they sought, and were denied access to, specific agency records. *See, e.g., Dep't of Justice v. Julian*, ___U.S.___, 108 S. Ct. 1606 (1988); *Brandon v. Eckard*, 569 F.2d 683, 687-88 (D.C. Cir. 1977) ("FOIA does not discriminate among persons seeking materials on grounds of their particular interests in the requested information"). Especially since section 10 of FACA expressly incorporates provisions of both the FOIA and the Sunshine Act, *see* 5 U.S.C. App. II §§ 10(b), (d), this Court should not, as the

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conferred by § 10" of FACA); *Physician's Education Network, Inc. v. HEW*, 653 F.2d 621, 622-23 (D.C. Cir. 1981) (allegations by a complainant that it "sought and was denied participation in the [advisory] panel's meetings . . . [is] sufficient . . . to support standing to invoke" FACA); *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 334 (2d Cir. 1979) (same).

These cases also refute the ABA's implication that the courts have not "construed FACA to give rise to an implied cause of action under any circumstances." ABA Br. at 15 n.11. Moreover, Congress has amended FACA twice since its enactment, yet has never repudiated the unbroken chain of precedent recognizing a right to bring suit to challenge FACA violations. *See* 5 U.S.C. App. II § 7, as amended, Pub. L. No. 96-523, § 2, 94 Stat. 3040 (1980); 5 U.S.C. App. II § 10, *as amended*, Pub. L. No. 94-409, § 5 (c), 90 Stat. 1247 (1976); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982) ("[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts . . . the question is whether Congress intended to preserve the pre-existing remedy"). In any case, as the Justice Department acknowledges, DOJ Br. at 16 n.14, appellants plainly have a right to seek relief under the Administrative Procedure Act from the Department's failure to satisfy its statutory responsibilities. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979).

ABA urges, establish widely divergent standing requirements for those seeking to safeguard their rights under these interlocking statutory schemes. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (persons denied truthful information about housing by private sources are denied right created in Fair Housing Act and thus have standing).[3]

In contrast to the ABA, the Justice Department contends that appellants have standing to assert claims under some sections of FACA, but not others. DOJ Br. at 12. Obviously, a finding that appellants have rights under *any* provision of the Act requires resolution of the threshold question of whether the Department's use of the ABA Committee is subject to the Act at all, which is the only statutory issue that must be decided now. *See* PC Br. at 35. In any event, appellants have properly asserted a deprivation of their statutory rights beyond their lack of access to some Committee meetings and records.

Thus, under section 9(c) of the Act, each agency using an advisory committee must prepare and file a charter informing the public of "the committee's objectives and scope of its activity"; "the duties for which the committee is responsible"; and "the estimated number and frequency of committee meetings." *Id.* at §§ 9(c)(B), (F), (I). Similarly, in addition to giving the public the right to attend non-exempt meetings of advisory committees, the

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[3] The ABA's argument on causation and redressability makes even less sense than its argument on injury-in-fact. *See* ABA Br. at 16-17. While Public Citizen agrees that most, if not all, discussions of the suitability of potential nominees for the federal bench could be kept confidential under FACA's exemptions, it has certainly not suggested, contrary to the impression created in the ABA's brief, that *all* meetings and *all* documents of the ABA Committee could be withheld from the public. *Id.* at 16. As Public Citizen stated in its opening brief, compliance with FACA would likely result in public access to additional discussions and documents regarding the overall functioning of, and role played by, the ABA Committee, including the procedures the Committee uses to investigate and evaluate judicial candidates, the manner in which the Committee votes on ratings, and the degree to which the Committee should, as a general matter, scrutinize the legal philosophy or political ideology of potential judicial candidates. PC Br. at 40.

statute also requires that, as a general rule, "interested persons" are entitled to receive notice of all committee meetings on a timely basis. *Id.* at § 10(a)(2). When "interested persons," such as appellants, are deprived of the opportunity to review a committee charter or are not given the advance notice of meetings required by the Act, they have "suffered injury in precisely the form the statute was intended to guard against." *Havens Realty, supra,* 455 U.S., at 373. Accordingly, under the government's own theory, appellants have standing because they have asserted cognizable injuries under a number of FACA's provisions, each of which is designed to provide members of the public with additional information regarding the activities and operations of advisory committees. For all these reasons, appellees' standing arguments should be rejected.[4]

II. THE JUSTICE DEPARTMENT'S USE OF THE ABA COMMITTEE IS COVERED BY FACA.

Appellees and their *amici* urge this Court to ignore the plain language of FACA and to give the term "utilized" an artificially narrow construction that has no grounding in the statute itself. Under appellees' theory, FACA's coverage is not based on the langauge of the law, but on a free-floating assessment of whether the Act's underlying "purposes" will be furthered through its

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[4] We agree with the Department that there is no reason for this Court to consider how FACA's provision for balanced representation should be applied to the Justice Department's use of the ABA Committee. DOJ Br. at 14-15. As the government notes, there is an unresolved statutory issue as to whether this provision applies to committees that are "utilized" rather than "established" by the government. *Id.* at 16-18. Moreover, even if the provision were applicable here, its actual application would depend on the precise function and purpose of the Committee, as spelled out in the charter that would be filed by the Department. *See National Anti-Hunger Coalition, supra,* 711 F.2d at 1074. Accordingly, at least until the Department has had the opportunity to delineate the Committee's function in a charter, it would be premature to consider the applicability of the Act's balanced representation provision. *See* PC Br. at 4-5.

application in a particular case. DOJ Br. at 23-29; ABA Br. at 22-23. This argument violates fundamental principles of statutory construction, as the Department itself recognized shortly after FACA was enacted. In a series of memoranda prepared in 1973 and 1974, the Department's Office of Legal Counsel ("OLC") concluded that "[u]nder any reasonable construction of 'utilization,' the ABA Committee . . . is utilized by the Department," *Memorandum from OLC to Associate Deputy Attorney General*, at 4 (June 21 1974), and that "[a]n honest reading of the statute points in the direction of inclusion." *Summary Statement of View that FACA Applies to the ABA Committee, Attachment to Memorandum from Special Assistant to the Attorney General to Assistant Attorney General*, at 3 (January 23, 1974) ("Summary Statement") (these memoranda have been lodged by the Department with the Court).

As this Court recently reaffirmed, "[d]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962); *see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (the plain language of a statute "must ordinarily be regarded as conclusive"). Thus, "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously,' even under the best of circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982), *quoting Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977). And, when "nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke, supra*, 471 U.S., at 96.

That is precisely the domain appellees are urging this Court to enter: there is nothing in FACA's legislative history which suggests that Congress did *not* intend the word "utilized" to be given its ordinary meaning, or that long-term, entrenched advisory relationships like the one involved here should not be covered by the law. To the contrary, Congress could not have been clearer in declaring that the statute was "meant to include those committees [like the ABA Committee] *which may have been organized before their advice was sought by the President or any agency, but which are used by the President or any agency in the same way as an advisory Committee formed by the President himself or the agency itself.*" H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972) (emphasis added), *reprinted in* Congressional Research Service, *Federal Advisory Committee Act Source Book: Legislative History, Texts and Other Documents*, 95th Cong., 2d Sess. 274 (Comm. Print 1974) ("Source Book").[5]

Moreover, even if the Court were to pursue appellees' peculiar brand of statutory construction, their arguments regarding FACA's "purposes" are based on nothing more than their own subjective and self-serving assertions of the underlying reasons why FACA was enacted. We agree that one of Congress' objectives in enacting FACA was to eliminate some unnecessary advisory bodies and reduce the costs of others. ABA Br. at 22; DOJ Br. at 25. It is likewise correct, as the district court observed, that "Congress may have been particularly motivated to shine the light on agency relationships with special interest or regu-

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[5] Contrary to the assertion of the ABA and People for the American Way, nothing in the Conference Report repudiates this statement. In fact, the Conference Committee emphasized that it had "adopt[ed] the House definition of 'Presidential advisory committee' *without any change* . . . ." *Id.* at 323 (emphasis added). In any case, since the ABA only began to provide confidential recommendations regarding potential judicial nominees at the direct request of the Executive Branch, ABA Br. at 46, its advisory arrangement was, in the words of the Conference Report, "directly established . . . *for*" the Justice Department and the President. *Id.* at 324 (emphasis added).

lated groups . . .." App. 12a. But to suggest, as do appellees, that these were the sole or even predominant objectives of the law is simply to ignore Congress' own statement, *in FACA itself*, as to why it was creating the statutory scheme at issue.[6]

Remarkably, while appellees purport to present the "Congressional concerns underlying the enactment of FACA," ABA Br. at 24, and the "two noncontroversial purposes" that Congress "had in mind" in passing the law, DOJ Br. at 27, neither of them even cites the "Findings and Purposes" section contained in the Act. *See* 5 U.S.C. App. II § 2(b). The *six* sweeping Congressional objectives delineated in that provision underscore Congress' intent to establish a comprehensive statutory scheme that would create basic standards and safeguards for all advisory committees used by the executive branch, not simply those that are deemed by the government to be "inefficient," DOJ Br. at 25, or to pose the risk of "'agency capture.'" *Id.* at 25. Of particular pertinence here, Congress "declare[d] that . . . the public should be kept informed" regarding the "purpose, membership, [and] activities" of all advisory committees. 5 U.S.C. App. II § 2(b)(5). Congress did not state that this vital public education function should apply only to some advisory committees and not others, and it certainly did not suggest that the public's right to learn about the practices and procedures of influential executive branch advisory bodies should be restricted along the arbitrary lines invented by appellees, *i.e.*, the public may learn about committees that are influencing agencies' implementation of

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[6] Of course, even if appellees had accurately described Congress' principal objectives in creating FACA's requirements, that would hardly be "sufficient to overcome . . . the clear, generic meaning" of the "language which Congress enacted . . .." *Regan v. Wald*, 468 U.S. 222, 237 (1984). Contrary to appellees' supposition, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in the legislative history," particularly where "the text of the . . . statute plainly embraces criteria of more general application." *Pittston Coal Group v. Sebben*, ___U.S.___, 109 S. Ct. 414, 420-21 (1988).

statutes, but not equally powerful and publicly-significant committees influencing other functions of the Executive Branch.

In particular, there is no support whatsoever for appellees' assertion that the public's interest in learning about the operations and activities of advisory committees is "wholly inapt with respect to a group that . . . advises the President on his exercise of a power vested solely in him by the Constitution." DOJ Br. at 28; *see also* ABA Br. at 24-25. Indeed, the D.C. Circuit rejected an identical argument regarding the reach of the FOIA in the course of holding that documents obtained and generated by the Attorney General "for the ultimate benefit of the President in a nominating role that is exclusively his" are agency records covered by the FOIA. *Ryan v. Dep't of Justice*, 617 F.2d 781, 786, 788 (D.C. Cir. 1980). In *Ryan*, Judge Malcolm Wilkey, writing on behalf of Judges Carl McGowan and Gerhard Gesell, emphatically rejected the government's contention that the FOIA should not apply to records regarding the nomination process because the

> nomination of judges is a purely presidential function . . . Such an approach, defining 'agency records' by the purpose for which they exist, would cut back severely on the FOIA's reach as interpreted by courts since its inception . . . Documents of the Central Intelligence Agency and the National Security Agency are compiled precisely for the function of advising the President in the solely presidential role of Commander-in-Chief. Yet in many FOIA encounters with NSA and CIA, we have never held or seriously considered that [their records are not subject to the FOIA].

Id. at 788. Accordingly, Judge Wilkey concluded that the limitation on the FOIA manufactured by the Justice Department "does not appear as either a realistic or intended distinction under the Freedom of Information Act." *Id.* at 787. The distinction urged by appellees here has likewise been invented out of whole

cloth and makes no more sense than in the FOIA context. Thus, if Congress did not exclude from the FOIA records created by the Justice Department to assist in the nomination process or other "purely Presidential function[s]," *Ryan*, *supra*, 617 F.2d at 788, it would be anomalous in the extreme to hold that Congress intended to exclude from FACA the records and deliberations of advisory committees that assist the Department in those same activities, especially since Congress incorporated the FOIA's exemptions into FACA.[7]

Appellees also never come to grips with the fact that Congress expressly excluded from the FACA's coverage a number of advisory committees, such as those that are "established or utilized" by the Federal Reserve System, *id.* at § 4(a), but it did *not* exclude the ABA Committee, even though, according to appellees, it "must have been aware . . . of the well-known practice of relying on the ABA Committee for confidential advice . . .." DOJ Br. at 30. In other words, in FACA itself, Congress carefully drew the line it wanted between advisory functions that should be covered by the statute and those that should not. Therefore, the Court should reject appellees' suggestion that it discard the lines drawn and the balance struck by Congress and substitute those preferred by appellees.[8]

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[7]In addition to the nomination function, appellees suggest that their limitation on the applicability of FACA would apply to numerous other Executive Branch functions that are described as "exclusively vested in [the President] by the Constitution," including the veto and pardon powers and the power to negotiate treaties. DOJ Br. at 31; ABA Br. at 20 n.17. Not only would this carve out a gaping hole in FACA's coverage without any evidence it was intended by Congress, but it would also run counter to the Executive Branch's application of FACA to a variety of advisory committees created to assist in the performance of these functions, such as the Advisory Committee for Trade and Negotiations, the General Advisory Committee on Arms Control and Disarmament, and the National Security Agency Advisory Board. *See* President's Seventeenth FACA Report at 30, 34.

[8] Appellees also contend that Congress' primary concern was to "counteract . . . the tendency of various interest groups to exert undue influence on

In addition to asking the Court to disregard the language of FACA itself, appellees also seek to circumvent the longstanding, common-sense construction of this language by the executive branch agency that has been "entrusted to administer" FACA. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The Department admits that the General Services Administration ("GSA") has been delegated the authority to develop government-wide rules and guidelines for the implementation of FACA, DOJ Br. at 27, yet — in stark contrast to the usual position taken by the Executive Branch before this Court — it suggests that the Court should place no stock whatsoever in GSA's definition of the term "utilized." That definition, as explained in our opening brief, PC Br. at 17-18, fits the ABA Committee like a glove and, just as importantly, it highlights why the ABA Committee is fundamentally different from the "legion of other groups" that may, from time to time, provide advice to the President and which everyone, including appellants, agree are not within FACA's coverage. DOJ Br. at 21.

As GSA has explained, an entity is being "utilized" as an advisory committee when it is being used in the "same manner as [an agency or the President] would obtain advice or recommendations from an established advisory committee . . .." 52 Fed. Reg. 45,930 (1987). Thus, at the threshold, covered entities

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federal agencies having regulatory or policy authority over matters directly involving those interests," DOJ Br. at 27 (emphasis added), and had no concern with purely Presidential advisory committees not controlled by "regulated entities." ABA Br. at 23. However, if appellees' view was correct, then Congress would have limited the Act to advisory committees that are "established or utilized by one or more agencies," 5 U.S.C. App. II § 3(2)(C), and would not have included, as it did, a separate provision encompassing all committees that are "established or utilized *by the President* . . .." *Id.* at § 3(2)(B) (emphasis added). Since Congress intended the law to cover committees that render advice directly to the President, it certainly intended to apply the law to advisory bodies, like the ABA Committee, that merely report to a federal agency and not directly to the President.

must have, as Judge Gesell has reasoned, "some sort of established structure and defined purpose as 'advisory committees' . . ." *Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975). The ABA Committee meets this description because, as the district court observed, it "self-consciously and purposefully acts 'as a committee,'" for the "singular purpose" of rendering advice regarding judicial nominees, App. 10a, 11a, but the same cannot be said of *any* of the interest groups cited by appellees or *amici*. Indeed, none of those examples involves an advisory committee at all. Rather, they merely constitute "informal contacts by the President or his immediate staff with interested segments of the population," such as the AFL-CIO or the NAACP. *Nader v. Baroody, supra*, 396 F. Supp. at 1234. The courts have long since held that such contacts do not trigger FACA's coverage, and that interpretation is plainly reflected in GSA's regulations as well. *See* 52 Fed. Reg. 45,930.

Furthermore, even an entity structured as a committee is not subject to the Act if it is simply one of a number of groups providing the government with its views on an issue of public concern. Rather, it is the government's decision to adopt the entity "through institutional arrangements," 52 Fed. Reg. 45,930 (1987), as a "traditionally, routinely, and preferentially utilized source of advice," App. 11a, that renders the advisory relationship identical, as a practical matter, to the government's use of an "established" committee. Here, for example, DOJ has integrated the ABA Committee into its formal decision making process to such an extent that the Committee is the only entity outside the government that is regularly given access to confidential government information regarding prospective judicial nominees, and is even afforded the authority to *interview* and send questionnaires to prospective candidates, who must submit to this process if they want to be considered for nomination to the federal bench. J.A. 21-22. None of the examples cited by

appellees or *amici* is even remotely similar to this structured, mandatory, and exclusive advisory arrangement. Thus, a ruling that the ABA Committee is being "utilized" by the Justice Department in the same manner as a formally "established" committee would not sweep within FACA's scope the sorts of "amorphous, ad hoc" meetings that routinely take place between various interest groups and executive branch officials. *Nader v. Baroody, supra*, 396 F. Supp. at 1233.[9]

In their final statutory argument, both appellees suggest that Congress could not have intended to apply FACA to the ABA Committee because, in enacting the Omnibus Judgeships Act of 1978, it issued standards and guidelines regarding the nomination of district judges, but did not make them binding on the President. ABA Br. at 25; DOJ Br. at 30-31. However, the fact that Congress may have recognized limitations on its ability to prescribe *who may actually be nominated as a federal judge* bears absolutely no legal or logical relationship to the question of whether a general procedural statute such as FACA is applicable to an advisory committee used by the Justice Department, just as it has no bearing on whether the FOIA is applicable to "agency records" generated by the Justice Department regarding the nomination process. *See Ryan v. Dep't of Justice, supra*, 617 F.2d at 788. As we demonstrate more fully below, appellees have

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[9] This special, confidential relationship between the ABA Committee and the Department also answers the ABA's First Amendment claim, as the Department recognizes. DOJ Br. at 46 n.52. If the ABA declined to review confidential information regarding prospective judicial nominees and thus refused to be incorporated into the government's internal decision making process, then it would not be subject to FACA. In that event, the ABA would have the same right as any other group to discuss public information regarding the nomination process and to convey its views to the government. It is evident, therefore, that what the ABA is actually asserting is a First Amendment right to obtain government information that is not available to any other member of the public, and to have a confidential, exclusive, unaccountable advisory relationship with the government. Nothing in the First Amendment guarantees such special treatment for the ABA or anyone else.

failed to recognize the distinction between efforts by Congress to usurp for itself a power that is granted to the Executive Branch — such as an effort by Congress to control *who* may be nominated as a federal judge — and statutes such as the FOIA, the Sunshine Act, and FACA, which do no more than create neutral procedural requirements that must be followed by the executive branch when it exercises its statutory or constitutional responsibilities.

III. APPELLEES' APPOINTMENTS CLAUSE AND SEPARATION OF POWERS ARGUMENTS ARE WITHOUT MERIT.

Appellees spend most of their constitutional argument establishing a proposition with which we do not, and never have, disagreed, *i.e.*, that the Constitution assigns to the President and not the Congress the responsibility to nominate federal judges. But appellees have, once again, fallen woefully short of proving that the application of FACA to an advisory committee used by the Justice Department would significantly impair the President's ability to carry out his constitutionally-assigned nomination functions.

Appellees have not attempted to demonstrate that the application of any of FACA's requirements to the ABA Committee would violate the actual text of the Appointments Clause or, for that matter, any other provision of the Constitution. Nor have they shown that the application of procedural safeguards designed to increase public accountability would contravene the intent of the Framers. Indeed, neither of the appellees has a convincing response to the fact that such procedural safeguards dovetail with the concern of Alexander Hamilton — on whom appellees place primary reliance — that private committees not be permitted to exercise undue influence over the appointment process while being completely "impenetrable to the public eye

. . .." *The Federalist* No. 77, at 500 (E. Earle ed. 1937).[10]

Since appellees cannot prove Congressional usurpation of an executive function, their argument hinges on the alleged effects that FACA would have on the Department's use of the ABA Committee. To support the sweeping ruling below, appellees contend that *none* of FACA's requirements can be met by the Department without destroying its advisory arrangement with the ABA Committee and, in turn, that destruction of that relationship will prevent the President from making informed nominations. However, appellees' argument ignores the fact that thousands of advisory bodies, including many that are directly comparable to the ABA Committee, have managed to comply with FACA without suffering such calamities. Appellees do not deny that the ABA Committee is virtually indistinguishable, in form and function, from the hundreds of peer review advisory bodies that are chartered under FACA. *See* PC Br. at 37 & n.6. Just as the ABA Committee assesses the professional qualifications and attributes of potential nominees to the federal bench, peer review committees of the National Science Foundation and the National Institutes of Health, for instance, evaluate the attributes and abilities of individuals seeking federal funds. *Id.* And, just as these peer review bodies have adapted to FACA's requirements without sacrificing necessary confidentiality or otherwise forfeiting their effectiveness, there is simply no reason why the same would not hold true for the ABA Committee.

Of the manifold provisions of FACA, appellees have directed most of their ire at only two features of the Act: the provisions that authorize public access to some meetings and records of

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[10] Indeed, the Senate Report expressly recognizes that the "federal decision-maker is . . . solely responsible for the execution of federal policy," Source Book at 163-64, and that Congress did not intend to usurp those responsibilities. Rather, FACA was passed to ensure that the executive's responsibilities would not improperly and secretly be usurped by committees consisting of private individuals. That is precisely the risk pinpointed by Hamilton in the Federalist Papers.

advisory committees, *see* 5 U.S.C. App. II §§ 10(a)(1), (b), (d), and section 10(e), which provides that a designated federal officer must "chair or attend each meeting of each advisory committee." *Id.* at § 10(e). But on close inspection, appellees' objections amount to all smoke and no fire. With respect to public access, appellees focus on the need to safeguard materials and discussions regarding the "professional qualifications of prospective nominees to the federal bench," including "confidential interviews with attorneys, judges and law professors in the nominee's community." ABA Br. at 36. On the other hand, appellees have asserted no reason to withhold the more general descriptions of the Committee's function, role, and activities regarding the nomination process that appellant Public Citizen actually seeks.

Most importantly, FACA's provisions were crafted, and can easily be applied, to accommodate the distinction between discussions of general policy, to which the public should ordinarily have access, and records and meetings relating to individuals, in which there may be a substantial interest in confidentiality. Thus, while appellees profess concern as to whether the Act's personal privacy exemption could be used to protect materials relating to the "qualifications and character of prospective judicial nominees," ABA Br. at 39, DOJ Br. at 45, they do not deny either that the exemption appears tailor-made for this purpose or that it is used by hundreds of peer review committees to protect identical materials. *See* President's Seventeenth Annual FACA Report at 2; PC Br. at 37 n.6. Particularly since the Department has never even attempted to apply FACA's provisions to the ABA Committee, the government's "uncertainty regarding the application of the FOIA and Sunshine Act exemptions," DOJ Br. at 45, does not afford a basis for declaring the law unconstitutional in its entirety.

The only other specific complaint that appellees have voiced with regard to FACA's provisions is that the ABA Committee

does not want a federal officer to attend its discussions of potential judicial nominees. That is a strange argument indeed in view of appellees' assertion that the ABA Committee's role is to "deliberate with" federal officials and, ultimately, the President regarding potential judicial nominees. DOJ Br. at 41. It makes little sense for the government to contend that the interest ultimately at stake in this case involves the President's ability to obtain candid and reliable advice from the ABA Committee, *id.*, yet attack FACA on the grounds that Committee members do *not* want to express their candid views and opinions about potential nominees to a federal employee who, according to appellees, is the "direct subordinate[] of the President." *Id.* at 41 n.44, *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982).

Moreover, appellees' attack on section 10(e) constitutes the classic straw man argument since the ABA concededly conducts virtually none of its evaluations of prospective judicial candidates through formal meetings. According to appellees, members of the Committee almost always transmit their votes on ratings to the Committee Chair "by mail or telephone," and they rarely, if ever, hold meetings to discuss prospective nominees. DOJ Br. at 4. Yet neither section 10(e), nor any other provision of FACA, would interfere in the slightest with this practice.

Both the Department and the ABA also complain about the lack of a general deliberative process exemption in FACA, but they fail to point to a single meeting or document that requires confidentiality and would be covered by such a privilege, yet would not be covered by the personal privacy exemption or another statutory exemption. In addition, appellees' generalized argument regarding the need of the President "to deliberate with his advisors" in secret, DOJ Br. at 41, has no connection to the members of the ABA Committee, who are not selected by the President and do not even report to him, let alone "deliberate with" him regarding judicial nominees. In fact, since the Committee members simply transmit their ratings to the Chairman by

mail or telephone, they do not, as a general rule, even deliberate among themselves.[11]

But even if the Committee arrived at all of its ratings in formal meetings, section 10(e) would still not interfere with its work. The provision simply provides that "[t]here shall be a designated officer or employee of the Federal Government to chair *or* attend" meetings of advisory committees. 5 U.S.C. App. II § 10(e) (emphasis added). The Senate Report stressed that this provision was "not intended to be used to restrict or interfere with the legitimate functions of advisory committees," but was primarily designed to "guard against possible antitrust violations and conflicts of interest." Source Book at 167.

In accordance with section 10(e)'s language and purpose, appellees could easily devise methods of holding meetings without exposing the Committee's deliberations on prospective nominees to a Justice Department employee. For example, *any* federal employee could be appointed as the designated federal officer — such as an employee of GSA who has expertise in the requirements of FACA, but has no interest in, or knowledge of, the judicial nomination process. There is no hint in the record or appellees' briefs that the mere presence of such an employee would interfere with the Committee's deliberations, particularly if the employee made a commitment not to divulge the deliberations to anyone else. And if even that was not sufficient to allay the ABA's concerns, appellees could presumably adopt an arrangement under which the federal employee would be present for the beginning of the meeting — to ensure that the Committee

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[11] In contrast, numerous high-level advisory committees, whose members are selected by and report directly to the President, hold open meetings under FACA, including the President's Commission on Federal Ethics Law Reform, which recently released its report and recommendations. If these Presidential commissions can comply with FACA's requirements without a general deliberative process exemption, it is difficult to see how the absence of such an exemption can create a constitutional barrier to the application of FACA to the Justice Department's use of the ABA Committee.

intended to discuss matters that could properly be closed to the public — but would not be in the room during deliberations on prospective nominees. That would certainly comport with Congress' intent, but would avoid any conceivable interference with the Committee's work.[12]

In the final analysis, it is evident that appellees are not complaining that any of FACA's provisions would *necessarily* interfere with the advisory arrangement at issue here, let alone that all of them would do so. Indeed, in 1973 and 1974, OLC concluded that FACA could be applied to the Committee "*without impairing its present efficiency and effectiveness*," *Memorandum from OLC to Deputy Attorney General*, at 9 (May 23, 1973) (emphasis added), and that "*coverage by the Act would have relatively little practical effect upon the Committee.*" Summary Statement at 6 (emphasis added). Thus, appellees' arguments ultimately amount to little more than that they simply do not want to comply with the same basic procedural standards and safeguards that are routinely followed by hundreds of other advisory committees that are functionally identical to the ABA Committee. That is not a "'compelling constitutional reason[]'" to "'invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President . . ..'" *Mistretta v. United States*,___U.S.___, 109 S. Ct. 647, 661 (1989), quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (opinion concurring in the judgment).

CONCLUSION

For these reasons, the judgment below should be reversed.

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[12] The ABA's assertion that FACA would "permit a government official to shape the content of the views of the ABA Committee," and "adjourn meetings as soon as undesirable views are expressed," ABA Br. at 42, contradicts the express language of the Act. Section 5(b)(3) declares that federal officials must take all necessary steps to "assure that the advice and recommendations of the advisory committee *will not be inappropriately influenced by the appointing authority . . . but will instead be the result of the advisory committee's independent judgment.*" 5 U.S.C. App. II § 5(b)(3) (emphasis added).

Respectfully submitted,

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